INDEX

	Page
Citations	ii
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Argument	3
Conclusion	6
Certificate of Service	6
Appendix	9

CITATIONS

Page

CASES:

Atwell, et al. vs. United States
414 F. 2d 136 (1969) Fifth Circuit 5

Hester vs. United States
265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924) 4

Smith vs. State
41 Ala. App. 528, 138 So. 2d 424 (1962) 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 28, Section 1257(3), United States Code 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

HUGH GRAY WHISTENANT,

Petitioner

versus

STATE OF ALABAMA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

The petitioner has applied to this Honorable Court for a Writ of Certiorari to review the judgment of the Court of Criminal Appeals of Alabama rendered on February 20,

1973. An application for rehearing was denied on March 20, 1973. A Petition for the Writ of Certiorari was denied by the Supreme Court of Alabama on May 17, 1973.

Petitioner applied for this Writ of Certiorari under the provisions of Title 28, Section 1257(3), United States Code.

QUESTION PRESENTED

I

Whether the defendant's Fourth Amendment rights were violated when State and Federal officers observed the events taking place in the defendant's barn through an open barn door while the officers were stationed on the defendant's property 75-100 yards from the barn.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Hugh Gray Whistenant was convicted of buying, receiving, concealing, or aiding in concealing stolen property (to-wit: an automobile), and was sentenced to seven (7) years in the state penitentiary. On appeal the Alabama Court of Criminal Appeals affirmed the judgment of the trial court on February 20, 1973. An application for rehearing was denied on March 20, 1973. A Petition for the Writ of Certiorari was denied on May 17, 1973 and Whistenant filed the instant petition.

The opinion of the Court of Criminal Appeals of Alabama contains a detailed and accurate statement of the facts in this case and is included in this brief for the Court's convenience.

ARGUMENT

In the instant case before this Honorable Court two State investigators and one Federal agent admittedly concealed themselves approximately 75-100 yards from the defendant's barn on what purportedly was the defendant's property. This occurred on October 19 and on the morning of October 20, 1971. From their positions the agents observed the activities which went on in the defendant's barn. The barn door which was large enough for a car or pickup truck to enter and leave, was left wide open at all times. Their positions along the tree line during their surveillance gave them a clear and unobstructed view across an open field to the barn where criminal activity was plainly observed.

The Alabama case law defines a "search" in the following terms in *Smith v. State*, 41 Ala. App. 528, 138 So. 2d 474 (1962):

> ". . . A search implies a probing into secret places for that which is hidden; it implies force, actual or constructive; or a forceable dispossession of the property of one by exploratory acts. Kelley v. State, 39 Ala. App. 572, 105 So. 2d 687."

The Alabama Court of Criminal Appeals did not consider the actions of the officers in simply observing the activities inside the barn across an open field to be a seacrh.

In the main, however, the Alabama Appellate Court based its decision on the decision of this Honorable Court in *Hester v. United States*, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924). The facts in that case were very similar to those in the instant case. Revenue officers concealed themselves 50-100 yards from Hester's father's house. From this vantage point they observed Hester hand a bottle of moonshine to a customer. It was contended that the officers were trespassers at the time that they made their observations, and at trial there was a motion to exclude the evidence as well as a motion for new trial based on the supposed violation of Hester's Fourth Amendment rights. In his opinion Mr. Justice Holmes said:

> "* * * The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle — and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself *does not require an answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the spe-

> cial protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226."

The Alabama Court of Criminal Appeals further based its decision on the case of *Atwell, et al. v. United States*, 414 F. 2d 136 (1969), Fifth Circuit. The *Atwell* court held that a trespass does not of itself constitute an illegal search. The Court stated:

> "The record shows that the still in question was located approximately 250 yards from the back of a house in the open land beyond the curtilage of the house. Appellants argue that the Government should have proved that there was not an unlawful search or seizure before being allowed to introduce any testimony regarding what the officers saw at the still site. But inasmuch as the protection of the Fourth Amendment against unreasonable searches and seizures does not extend to 'open fields,' there was no unreasonable search. See, e.g., Hester v. United States, 1924, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898; Monnette v. United States, 5th Cir. 1962, 299 F. 2d 847. Moreover, even if the officers were trespassing on private property, a trespass does not of itself constitute an illegal search. Monnette v. United States, supra, United States v. Young, 4th Cir. 1965, 322 F. 2d 443. Accordingly, it was not error for the trial court to admit testimony regarding what the officers saw at the still."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the instant Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David W. Clark, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the

United States, hereby certify that on the ——— day of OCTOBER, 1973, I served copies of the foregoing Brief In Opposition of Respondent on Honorable Arthur Parker and Honorable J. Louis Wilkinson, by placing said copies in the mail, postage prepaid, and properly addressed to said attorneys of record, as follows:

Honorable Arthur Parker
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